BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
and	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

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COMMENTS OF TIME WARNER CABLE

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COMMENTS OF TIME WARNER CABLE

Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner"), hereby submits its Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

In this proceeding the Commission proposes to adopt rules implementing the non-accounting safeguards mandated by Congress in sections 271 and 272 of the Telecommunications Act of 1996.[2] These safeguards will govern BOC provision of interLATA

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[1] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (released July 18, 1996) ("Notice").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

telecommunications, interLATA information services and manufacturing.

The 1996 Act is intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[3] To promote such a result, Congress directed the Commission in sections 271 and 272 to implement structural and non-structural safeguards to protect both BOC subscribers and competitors from improper cost allocation and discrimination upon BOC entry into the provision of interLATA telecommunications and information service.

As the affiliate of an aspiring competitive local exchange carrier, Time Warner wholeheartedly endorses the Commission's effort to bring these safeguards to fruition. BOCs presently dominate the provision of local telephone service in their service areas, and BOCs control certain network functionalities needed by local service competitors as a prerequisite to entry. Chief among these is the group of services collectively referred to as "interconnection." BOCs have the incentive to deter competition and may do so simply by withdrawing the level of cooperation necessary to make interconnection a reality. The only positive incentive for the BOCs to implement and continue to provide the necessary quality of interconnection (and other

3 Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) ("Explanatory Statement").

competitive checklist items) is the promise of interLATA entry once the objectives are met. For these reasons, the Commission must not rely upon the safeguards adopted in this proceeding as the means of ensuring BOC compliance with the competitive checklist. Rather, the Commission must grant interLATA authority only when the checklist is met and the local bottleneck is demonstrably broken.

As a provider of non-video services, Time Warner is also vitally interested in full implementation of the separations requirements of section 272. Section 272 requires complete "independent operation" of information services, and no less. Therefore:

- The separations requirements of section 272 should be designed to minimize to the greatest extent possible joint and common costs;
- non-discrimination safeguards should be designed to reinforce the independent operation requirement mandated by section 272(b)(1); and
- the opportunities for anticompetitive conduct through joint marketing should be scrutinized carefully and minimized to the greatest extent possible;

The requirement for independent operations also means that the Commission must consider other BOC activities, outside the local exchange carrier and outside the separate affiliate established under section 272, that could be used by the BOCs to circumvent Congress' objectives. Through these other activities and affiliates, the BOCs, if left unchecked, could achieve the anticompetitive results the section is designed to preclude. As a provider of video services, Time Warner is especially concerned with the BOCs' opportunities to evade the structural separation requirements by providing information services through unseparated video affiliates. In order to close this loophole, Time Warner proposes that BOC video offerings be provided either on the telephone side of the business or on the separate affiliate side -- but not both. Under this proposal, BOCs could choose to jointly provision their video and information services so long as the provision of telephony is structurally separate. Alternatively, they could opt to jointly provision their video and telephony services, so long as their information services are structurally separate.

In addition, Time Warner recommends that the section 272 complaint procedures be promulgated so as to encourage complainants, including local telephone competitors, to seek redress of BOC malfeasance or nonfeasance. The procedures must also force the BOCs to produce the evidence necessary to resolve complaints.

Finally, the BOCs should be regulated as dominant in the interLATA telecommunications markets until the local telephone market is demonstrably competitive.

II. THE MOST IMPORTANT SAFEGUARD FOR COMPETITION IN LOCAL AND LONG DISTANCE TELEPHONY IS THE APPROPRIATE TIMING OF BOC IN-REGION INTERLATA ENTRY.

The issues under section 272 of the Telecommunications Act of 1996 remain largely unreached until a BOC has been granted authority to provide in-region interLATA telecommunications service pursuant to section 271. Section 271 provides that a BOC may offer interLATA telecommunications service within its local exchange service areas[4] upon a finding by the Commission that, inter alia, the BOC has "fully implemented the competitive checklist"[5] specified in section 271(c)(2)(B) of the 1996 Act. As a company poised to provide local telephone services in competition with incumbent local exchange carriers, including the BOCs, Time Warner is vitally interested in comprehensive and effective implementation of the checklist.

In the instant proceeding, the Commission proposes to adopt rules designed to promulgate structural safeguards to "protect subscribers to BOC monopoly services and competitors against potential improper cost allocation and discrimination"[6] that may result from BOC interLATA entry. While the Commission expressly recognizes that BOC entry into the provision of in-region interLATA services poses such dangers, the Commission goes on to state that "[t]he emergence of efficient, facilities-based alternatives to the local exchange and exchange access services

4 These services are hereinafter referred to as "interLATA services."

5 47 U.S.C. § 271(d)(3)(A)(i).

6 Notice at ¶ 8.

offered by the BOCs will, over time, eliminate the need for safeguards that Congress prescribed in the 1996 Act and the implementing rules that we will adopt in this proceeding."[7] However, as described in detail below, this anticipated regulatory ideal will never be reached if BOC in-region interLATA entry is permitted before the BOC stranglehold on the local loop is eliminated.

The Commission's focus in this proceeding on safeguards designed to protect against BOC abuse of market power following in-region interLATA entry is of course appropriate. However, the safeguards adopted in this proceeding must not be mistaken for a means of opening the local loop to competition. In large measure, the BOCs must release their market power in local telephony voluntarily. Under the 1996 Act, access to the in-region interLATA telephone market is the only positive incentive the BOCs have to open the local loop. Therefore, the promise of access to the in-region interLATA market is the most important regulatory tool available to the Commission. It must not be expended carelessly.

The BOCs possess nearly absolute control over their core markets. As acknowledged in the Notice, BOCs presently possess approximately 99.5 percent of their local telephone markets in terms of revenue.[8] At present, and for the foreseeable future, BOCs do and will control access to most local telephone

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7 Id. at ¶ 9.

8 Id. at ¶ 7.

customers. Most importantly, the ubiquity of the public switched network and its strategic importance empower the BOCs to control the success or failure of competitive entry. If competitors are to enter and provide alternative local telephone services, they must be able to offer local telephone services interconnected with the existing BOC network and its customers. Interconnection is a complex issue with legal, economic, and technical facets. These facets include numbering portability, reciprocal compensation, dialing parity, access to rights-of-way, access to databases and signaling, and unbundled network elements, among many others.

Therefore, if competition in the local loop is to succeed, BOCs must cooperate by providing the same efficient, quality interconnection to competitors as they provide to themselves.[9] In other words, BOCs must assist competitors in dismantling the local telephone monopoly. Unfortunately, prior to the 1996 Act, BOCs had no incentive to offer such cooperation under any terms. Indeed, in the Commission's recently released First Report and Order in CC Docket No. 96-98,[10] the Commission found "that incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to

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[9] 47 U.S.C. § 251(c)(2)(B)-(C) (requiring interconnection at any technically feasible point and at least equal in quality to that provided by the local exchange carrier to itself).

[10] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-68, CC Docket No. 95-185, First Report and Order, FCC 96-325, (released August 8, 1996) ("Interconnection Order").

provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."[11] As noted by the Commission, the 1996 Act provides the critical incentive by offering LECs the opportunity to integrate long distance telephone service (and other interLATA services) with their existing local telephone service.[12] However, if BOCs are allowed to enter the interLATA market without first ensuring strict compliance with the section 271(c)(2)(B) checklist, including compliance with the requirements of section 251, then the Commission will have little effective means of compelling such a result. Once BOCs are allowed to enter the interLATA market, the Commission would find it extremely difficult, if not impossible, to put the interLATA "genie" back into the regulatory "bottle."[13]

Although the Commission will have certain remedial powers available, including revocation of interLATA authority, the imposition of forfeitures, and injunctive powers to compel BOC cooperation, such sanctions are suboptimal. The anticompetitive opportunities available to each of the BOCs in each of the local markets are enormous in number and scope. Any seemingly small detail of interconnection could substantially raise the costs of new entry. To the extent operational problems cause reputational damage to these new entrants, the harm could be irreversible.

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11 Id. at ¶ 55.

12 See Notice at ¶ 6, n.13.

13 Revocation of interLATA authority will prove problematic on a number of levels, not the least of which is the inevitable inconvenience to consumers.

The BOCs can also structure their behavior in such a manner that will be difficult to establish a violation of the Act.[14] BOCs have historically proven adept at cloaking discrimination in the provision of bottleneck services with colorably legitimate business practices. BOCs can obtain a significant competitive advantage simply by withdrawing full cooperation from their competitors. In the Notice, the Commission acknowledges that "a BOC could provide inferior service to, charge higher prices to, withhold cooperation from, or fail to share information with its rivals in competitive markets."[15] Indeed, the Commission's Chief Economist has stated that "[t]hese problems are hard to regulate away, because the withdrawal of cooperation from rivals may be subtle, shifting, and temporary, but yet have real and permanent effects. . . ."[16]

For example, a likely growth area for all service providers is the provision of new services. However, because carriers inherently lack experience with new services, it will be difficult to discern intentional BOC delays from good faith provisioning. Regulators will find it difficult to determine whether the fact that a BOC provisioned a competitor's new service only after its own service became available is

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[14] In light of this, Time Warner urges the Commission to adopt a strict liability standard for BOC non-compliance. See discussion, <u>infra</u>, at section VI.

[15] Notice at ¶ 65.

[16] Farrell, Joseph, "Creating Local Competition," (speech as prepared for delivery) May 15, 1996, Washington, D.C. at 5.

coincidence, or evidence of an anticompetitive scheme. Thus, subtle forms of discrimination may go undetected or unremedied.

It is therefore critical to ensure strict compliance with the section 271 checklist prior to permitting BOC in-region interLATA entry. Moreover, it is equally important to understand that strict compliance with the checklist cannot be measured simply by referring to the terms of an interconnection agreement. Actual competition which verifies ongoing compliance is necessary before the Commission can conclude that safeguards will adequately restrain the BOCs' continuing ability to cross-subsidize and discriminate. As described by FCC Chief Economist Joseph Farrell:

> The BOCs' incentives and ability to discriminate against rivals in long-distance -- to take the most prominent example of MFJ prohibitions -- depend on their market power in the local bottleneck. If we can open up the bottleneck and implement vigorous competition there, then BOCs will have little or no incentive to raise the costs of their long-distance partners -- and if they do so, those long-distance carriers and their customers will have other choices, so the harm to consumers will be limited. Thus, when there is enough competition in what is now the local bottleneck, it will make good sense to let the BOCs into complementary businesses such as manufacturing and long distance.[17]

The Commission should not be deceived; the hope of local competition is not competition in fact. The Commission must retain the BOCs' single incentive to bring about such a result before interLATA relief is granted.

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[17] Id. at 6.

III. CONGRESS' DIRECTIVE THAT THE COMMISSION ACT TO PREVENT BOC ANTICOMPETITIVE CONDUCT IN THE PROVISION OF INTERLATA INFORMATION SERVICES MUST BE FULLY IMPLEMENTED.

The Notice correctly recognizes that section 272 reflects congressional concerns for ratepayer harm and anticompetitive conduct that could predictably flow from BOC entry into competitive markets, most especially markets that were closed to BOC entry under the MFJ.[18] The 1996 Act supersedes the MFJ.[19] Whereas the MFJ barred BOC activity in certain businesses closely related to local telephone service, the 1996 Act allows entry subject to certain critical conditions and safeguards.

While they differ in solution, both the MFJ and the 1996 Act proceed from an identical concern: the combination of rate-based regulation with monopoly power leads to ineluctable incentives and abilities to harm ratepayers in the regulated market and impede competition in unregulated or less regulated markets. Through the devices of cross-subsidization and discriminatory access to essential facilities, BOCs can evade regulation to the detriment of consumers. Congress' ultimate means of solving this problem lies in section 251 -- to eliminate the local telephone monopoly, and ultimately, the need for its regulation. But Congress also recognized that passage of the 1996 Act would not immediately dissolve the BOC local monopolies, and included provisions to safeguard consumers and competition in the transition to competitive local telecommunications markets.

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18 Notice at ¶ 13.

19 See Telecommunications Act of 1996, § 601(a)(1).

The separate affiliate requirements of section 272 (as well as section 274) are the congressional solution to minimize the opportunities for regulatory evasion and anticompetitive conduct in related, competitive markets once entry is allowed. Failure to fully implement the 1996 Act's separate affiliate requirements will impair the development of competition and harm consumers.

A. Congress Designed Structural Separation to Minimize Cross-subsidization Opportunities.

A strictly enforced separate affiliate requirement may help to diminish the ability, if not the incentive, for rate-base regulated utilities to engage in cross-subsidization by minimizing joint and common costs between monopoly and competitive services. It is critical to recognize, as the Notice does, that even under a system of price cap regulation, BOCs maintain the incentive to absorb unregulated costs into regulated monopoly accounts and to allocate monopoly revenues to nonregulated accounts in order to export profits to the competitive activity.[20] While price cap regulation may somewhat reduce the incentives to cross-subsidize that would otherwise exist under rate-of-return regulation, price cap regulation, as adopted by the FCC and many of the states, maintains much of the problems of rate-of-return regulation and thus the incentives to

[20] Notice at ¶ 7.

cross-subsidize remain very real.[21] Cross-subsidization of the provision of information services, electronic publishing, or other competitive businesses could seriously distort efficiency in those industries, while causing harm to monopoly ratepayers in the form of higher rates. Separate affiliate requirements can reduce the potential for cross-subsidization by minimizing joint and common costs between monopoly services and competitive services and by making a more readily auditable trail of transactions between BOCs and their affiliates.

B. Congress Designed Structural Separation to Minimize the Dangers of Discriminatory Access.

The BOCs control access to end users through their monopoly local networks. They also control critical inputs of production for those competitive services that utilize the local network to produce or deliver their services. Preferential treatment to affiliated information service providers (or electronic publishers) could take such forms as more efficient interconnection, superior responses for new network functionalities, or more rapid repair times for troubleshooting. Conversely, competitors could suffer relatively slower access, longer outage periods, delays in service implementation, or be charged more for access than their BOC-affiliated competitors.

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21 See Leland L. Johnson, Ph.D., "Reply Comments: Allocating Common Costs to Avoid Cross-Subsidy and Enable the Sharing of Benefits," Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, CC Dkt. No. 96-112, Reply Comments of the National Cable Television Association, Attachment A (filed June 12, 1996)(explaining the incumbent LEC incentive to cross-subsidize in a price cap regime due to periodic reviews, sharing mechanisms and state controls).

By engaging in such discriminatory practices, the BOCs could capture additional market share not through superior products or greater efficiency but through anticompetitive conduct. As they drive out or diminish market opportunities for more efficient firms, efficiency is reduced and consumer welfare is significantly diminished. Separation will not eliminate the BOCs' incentives to engage in this conduct, but it may minimize the likelihood of its occurrence by making it more apparent when it does occur.

C. The Effects of Anticompetitive Conduct on Consumers Would Be Substantial.

The consequent harms of this anticompetitive behavior are readily apparent. First, local ratepayers would effectively subsidize the competitive ventures of the BOCs, contrary to the express prohibitions of Congress,[22] through inflated local telephone rates. Second, consumers of competitive services would receive less efficient products and services because the market share of more efficient firms has been displaced by the BOCs.

Congress' concerns for BOC misconduct upon entry into competitive markets are stated broadly in the 1996 Act, and should be implemented accordingly. Although only certain enumerated activities are set out for separation under the terms of section 272, the 1996 Act reflects as well a concern for BOC misconduct in other competitive markets beyond the categories listed in section 272. Thus, while incidental interLATA services

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22 See 47 U.S.C. § 254(k)("a telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition").

-- including the delivery of video and audio programming -- are not subject to the separations requirements, Congress nevertheless has expressly directed that "the Commission shall ensure that the provision of [incidental interLATA services] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[23] Even more sweepingly, section 254(k) commands that a carrier "may not use services that are not competitive to subsidize services that are subject to competition."[24] Therefore, the Commission should utilize and augment the congressionally-provided tools to protect ratepayers and the development of competition in all related competitive markets.

IV. TO FULFILL ITS STATUTORY OBLIGATIONS, THE COMMISSION MUST STRICTLY ENFORCE THE SEPARATE AFFILIATE REQUIREMENTS OF SECTION 272.

In addressing the fundamental problems raised by the vertical integration of rate regulated utilities into competitive businesses, Congress chose to favor entry, subject to strict separation between the monopoly and competitive activities. Rather than leaving the degree of separation wholly within the discretion of the agency, Congress acted to describe in considerable detail the minimum separations it deemed necessary to address the potential for anticompetitive conduct. In constructing these requirements, Congress built upon the

23 Id. at § 271(h).

24 Id. at 254(k).

Commission's own efforts in the Computer Inquiry II proceeding[25] and expanded upon them. It detailed BOC obligations in three areas: the degree of separation, nondiscrimination safeguards, and limitations on joint marketing. Congress' overall design is explained succinctly in 272(b)(1), through the broad requirement that the competitive affiliate "operate independently from" the monopoly enterprise. This overriding command requires that the separate affiliate be treated no differently from any unaffiliated third party, as a means of ensuring against the otherwise predictable harms from BOC entry into competitive activities. It thus provides the necessary template upon which the Commission must interpret and administer each of the specific requirements under section 272.

Time Warner discusses the appropriate implementation of the requirements of section 272 below. Because Time Warner currently competes primarily with information services of the BOCs, rather than interLATA telecommunications or manufacturing, the requirements are discussed principally within the context of information services.

A. The Separations Requirements of Section 272 Mandate Independent Operation with Minimal Joint and Common Costs.

Section 272(a)(2)(C) requires a BOC to provide interLATA information services through a separate affiliate. Some of the

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25 See Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) ("Computer II Final Decision") recon., 84 FCC 2d 50 (1980), further recon. 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

statutory mandates for separation are clear on their face; others require administrative development and amplification.

First and foremost among the latter type is the broad, overriding requirement that the affiliate "operate independently from" the BOC.[26] Independent operation necessarily means that the separate affiliate interrelate with the BOC as if it were not commonly owned or controlled; it stands in the shoes of any other third party in the applicable business.[27] The only exceptions made here should be those that flow from the statutory exceptions themselves. The requirement for independent operation thus provides the larger framework in which the FCC must implement all other provisions of the section.

As a means of faithfully implementing the requirement for independent operation, the Notice seeks comment on the application of certain Computer II restrictions imposed upon certain activities between the regulated entity and the separate affiliate.[28] Time Warner believes that adherence to Congress' directive requires that the strict separation contained in the Computer II rules in these respects be utilized here rather than the less stringent rules specified in the Competitive Carrier proceeding. Specifically, the separate affiliate should not be allowed to construct, own or operate its own transmission

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26 47 U.S.C. § 272(b)(1).

27 This construction is also required to give full effect to subsection 272(d)(5), requiring that the separate affiliate "conduct all transactions with [its affiliated BOC] on an arm's length basis."

28 <u>See</u> Notice at ¶ 58.

facilities, but rather it must obtain such capacity from the regulated carrier under tariff, or from third-party carriers. While not explicit in the statute, it is crucial to ensure that the local exchange monopoly is not leveraged into other markets.[29]

Further, section 272's requirement for "independent operation" must translate into requirements that the separate affiliate: (1) not lease or share physical space collocated with regulated transmission facilities used to provide basic service, (2) not share computer facilities with the carrier, (3) not develop software jointly with the regulated entity,[30] and (4) not market any other equipment or services to any affiliate. As the Computer II decision explained, absent these kinds of protections, the separations requirements could be readily evaded.[31] In addition, Time Warner supports the Notice's proposals to directly implement the unambiguous statutory requirements for non-recourse credit,[32] and for separate

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[29] Time Warner supports the adoption of additional accounting requirements, including those specifically set forth in section 272(b)(2) (separate books and accounts) and in section 272(b)(5) (requiring that all transactions between the BOC and its affiliates be reduced to writing and publicly available). These are to be addressed in the Accounting Safeguards proceeding. See Notice at ¶¶ 61, 64.

[30] Additionally, the Computer II rules precluding specific research and development by the regulated entity on behalf of the competitive affiliate should be adopted here. This would preclude not only joint development of software, but the development of software by the telephone company for the benefit of the competitive affiliate.

[31] See generally, Computer II Final Decision, 77 FCC 2d 384 at ¶ 261.

[32] Notice at ¶ 63.

officers, directors, and employees.[33] Time Warner therefore endorses the Notice's tentative conclusion that, unlike the exceptions provided for in Computer II relating to sharing of administrative functions, section 272's prohibition on common employees precludes the sharing of any "in-house" administrative services.[34]

These activities, as catalogued by the Notice, include "accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, and pension services."[35] The Notice also includes other in-house functions, such as operating, installation and maintenance personnel.[36] Sharing of any of these services would create common employees, contrary to plain statutory proscription. In addition, in the absence of a sharing restriction, the opportunities for unauditable subsidization, exchanges of information between the monopoly side and the separate affiliate, and discriminatory treatment will be rampant. Further, the Commission should make unambiguous that the prohibition on sharing of such "in-house" activities includes the sharing of such services wherever they are performed within the corporate family, that is, whether they are performed at the holding company level, in an administrative subsidiary, in the local exchange subsidiary, in the separate affiliate, or in any other affiliate. Only the "sharing" of third party-provided

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33 Id. at ¶ 62.

34 Id.

35 Id.

36 Id.

services should thus be allowed -- and there only where that third party actively provides services to other firms at large.

The history of sharing of administrative services has not been a happy one. One need only consider the case with NYNEX Materiel, a procurement arm of NYNEX responsible for procuring products and services for NYNEX's regulated and unregulated subsidiaries. The very unfortunate consequence of ratepayer subsidies through overpayments is well documented before this agency, with the result of substantial fines having to be imposed after years of tax dollars spent to investigate, prosecute, and settle.[37] To safeguard against this, the Commission should limit sharing to third parties not owned by the BOC, and further, that such third parties should be preexisting companies with credible books of business. The Commission should also ensure that, in such instances, the competitive affiliate pays its fair and full allocation of the costs charged by third parties.

A special prohibition for even third-party sharing should be made in the specific context of accounting and auditing, however, given that the FCC will be highly dependent upon the professionalism of the accountants in order to reveal, and thereby discourage from the outset, subsidization.

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37 See New York Tel. Co. and New England Tel. and Tel. Co., 5 FCC Rcd 866, *Order to Show Cause and Notice of Apparent Liability for Forfeitures* (1990); Proceeding Terminated Via Consent Decree, 5 FCC Rcd 5892 (1990), recon. denied, 6 FCC Rcd 3303 (1991), aff'd sub nom. New York State Department of Law v. FCC, 984 F.2d 1209 (D.C. Cir. 1993).

B. The Notice's Proposals for Nondiscrimination Safeguards Should Be Adopted.

The non-discrimination safeguards set forth under subsections 272(c) and (e) should be understood to provide specific reinforcement of the independent operation standard contained in subsection 272(b)(1). In essence, all of subsections 272(c) and (e) provide specific instances of ways in which the BOCs' incentives to favor their affiliated businesses must be curtailed. As such, they must be interpreted in their full breadth, with substantial audit trails and reporting requirements to ensure full compliance.[38]

The Notice also observes that the statutory constraint on discrimination stands in contrast to sections 201(b) and 202(a) proscriptions against unjust and unreasonable discrimination, and questions whether this difference reflects a congressional intent that the underlying tests for unlawful discrimination vary.[39] In the time between the release of the Notice and the due date for comments in this proceeding, the Commission released its Interconnection Order. In that decision, the Commission found that "Congress did not intend that the term 'nondiscriminatory' in [section 251 of] the 1996 Act be synonymous with 'unjust and unreasonable discrimination' used in the 1934 Act, but rather, intended a more stringent standard."[40]

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[38] For these reasons, Time Warner supports the Notice's specific proposal to preclude the transfer of local exchange network capabilities to separate affiliates. Notice at ¶ 70.

[39] Notice at ¶ 73.

[40] Interconnection Order at ¶ 217.

Time Warner believes that this ruling holds for section 272 as well. As in the case of section 251, the differing language of section 202 and section 272 must not be ignored. First, the provision of section 202(b) relates to tariffed services, whereas the non-discrimination safeguards of section 272 encompass a much broader set of services, goods, and facilities as well as the procurement of competitive services, goods and facilities by the regulated entity. Thus, the pricing standards of Title II will not readily translate to the newer, more open-ended context of 272.

Further, *any* preferential treatment under section 272 sounds an alarm that the underlying concerns of section 272 are potentially being breached. Indeed, the Commission reached this conclusion in the Interconnection Order, finding that "where an incumbent LEC proposes to treat one carrier differently than another, the incumbent must prove to the state commission that the differential treatment is justified based on the cost of providing that element to the carrier."[41] This concern runs not only to ILEC treatment of different requesting carriers, but also to comparisons of ILEC provisioning of its own services with that offered to requesting carriers.[42] As discussed in the enforcement section, Time Warner believes that any disparate treatment of a BOC affiliate must be subject to scrutiny under

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41 Id. at ¶ 1317. See also id. at ¶ 860.

42 Id. at ¶ 218 ("the term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself.")